

Public Hearing Summary
Maine Citizen Trade Policy Commission
June 15, 2012
Room 220, Burton M. Cross State Office Building
Augusta, Maine

Members Present: Representative Joyce Maker, Representative Bernard Ayotte, Representative Rotundo, Senator John Patrick, Linda Pistner, Connie Jones, Joseph Woodbury, Mike Karagiannes (for Heather Parent, DEP), Michael Herz, Steve Cole, Jay Wadleigh

Staff: Lock Kiermaier (Contract)

Upon the required number of members being present to constitute a quorum, the public hearing was convened by CTPC Chair Representative Maker at approximately 9:30 AM.

Current Maine law (10 MRSA §11 (9) C) requires the CTPC to conduct a biennial assessment on the impact of international trade treaties on the State of Maine. The CTPC has fulfilled that obligation by contracting with Professor Robert Stumberg of Georgetown University to conduct the required assessment on the proposed TransPacific Partnership Agreement (TPPA) and to present it in person in a public hearing context. The public hearing held on June 15th featured the presentation made by Professor Stumberg and provided an opportunity for commission members and members of the public to engage Professor Stumberg with questions and discussion about the assessment.

To provide a background to the CTPC's understanding of the assessment and international trade policy in general, Professor Stumberg commenced his presentation with a Powerpoint presentation entitled "*Oversight of Trade Policy*". (A pdf version of Professor Stumberg's various Powerpoint presentations will be posted on the CTPC website: <http://www.maine.gov/legis/opla/citpol.htm>) A brief summation of Professor Stumberg's introduction to international trade treaties is as follows:

Introduction: "Oversight of Trade Policy"

1. Evolution of trade policy: Paradoxically, as international trade treaties have evolved and become more democratic, it has become increasingly more difficult for nations to strike effective trade deals. The current phase of the World Trade Organization (WTO), the Doha Round, is currently stuck in negotiations and is likely to remain that way for the foreseeable future.
2. Current U.S. Trade Agreements: At the present time, the United States has committed to several types of trade agreements:
 - WTO currently consists of 20 different agreements involving 155 nations;
 - Free Trade Agreements (FTAs) currently exist with 19 nations and includes more than 20 separate chapters; and
 - Bilateral Investment Treaties (BITs) exist between the U.S. and 39 different nations.
3. Composition of trade agreements: Trade agreements typically include:
 - A forum for negotiating;
 - A framework for compliance;
 - A mechanism for dispute resolution; and

- A set of trade rules.
4. Affect of trade treaties on states: The trade rules included in different types of trade agreements affect states in different ways:
- WTO agreements affect goods, services, procurement, and subsidies;
 - FTAs affect goods, services and procurement; and
 - BITs only affect investments.
- Due to the provisions of certain international trade agreements, state authority over certain types of services and investment can be successfully challenged by foreign investor claims.
5. Enforcement of trade rules: In effect, trade rules are enforced through economic impact of resulting from trade sanctions, investor compensation and domestic enforcement.

Professor Stumberg then proceeded to make Powerpoint presentations that summarized the three principal elements of the draft “2012 Trade Policy Assessment” that he had authored for the CTPC:

I. TREATMENT OF TOBACCO IN THE TPPA

One of the primary questions regarding the potential elements of the proposed TPPA is how tobacco trade will be dealt with. A leading tobacco company, Philip Morris International (PMI) has been using the provisions of other trade agreements through the use of expensive litigation to successfully challenge existing tobacco controls in a number of countries including Ireland, Norway, Uruguay and Australia. The potential exists for PMI and other tobacco companies to use these same provisions to challenge individual state tobacco regulations. PMI has been advocating that the United States Trade Representative (USTR) negotiate the TPPA to allow tobacco to be treated in the same fashion as other trade sectors.

If the TPPA treats tobacco in the same fashion as other trade sectors, then existing tobacco regulations in the U.S. and other countries could be challenged on the basis of:

- Investment- investor rights could be invoked to dispute domestic regulations outside of domestic courts in international trade tribunals;
- Intellectual property- the expanded use of trademarks;
- Cross-border services- increase the applicability of trade rules to regulations that apply to tobacco-related services which include advertising, distribution and product display;
- Regulatory coherence- would require the participation of tobacco companies in the formulation of domestic policy; and
- Tobacco tariffs- would eliminate tariffs for tobacco products.

USTR is proposing a compromise on tobacco trade to be included in the TPPA. The elements of this proposal include:

- An explicit recognition of the unique status of tobacco products from a health and regulatory perspective;
- An elimination of all tobacco tariffs; and
- Allowing health authorities to develop regulations that use origin-based, science-based restrictions to protect public health.

The USTR proposal for the treatment of tobacco in the TPPA has been criticized on the following grounds:

- The proposal only covers rules and does not apply to legislation;
- The proposal only refers to the adoption of future rules and does not apply to the enforcement of existing rules;
- The proposal does not apply to rules adopted by non-health agencies such as those charged with licensing and taxation responsibilities;
- The proposal does not apply to investment and trade rules that are currently being used to challenge existing tobacco control regulations; and
- The proposal's use of a science-based test is more exacting than the existing health based standard.

Professor Stumberg then suggested that the CTPC had a range of possible options if it chose to take a position on the USTR proposal on tobacco for the TPPA:

- Adopt or endorse the USTR proposal as currently formulated;
- “carve out” tobacco entirely from the TPPA; i.e. provisions of the TPPA would not apply to tobacco trade; or
- Strengthen the USTR proposed exception on tobacco by specifying that all legislation and trade and investment rules are covered.

Finally, Professor Stumberg also pointed out that the USTR proposal on tobacco appears to be in violation of existing federal law and presidential Executive Order which prohibit the promotion of tobacco or the undermining of other countries' restrictions on tobacco trade.

II. PHARMACEUTICAL PROVISIONS IN THE TPPA

Recent actions by Maine and other states have succeeded in reducing the costs of drugs used by participants in the Medicaid program by up to 50%. The cost of prescription drugs in the Medicaid program have been reduced through state use of prior authorization, use of generics and increased copayments.

In response to pressure from major pharmaceutical companies, the USTR has made a proposal that the TPPA be negotiated to require reimbursement programs like Medicaid to use pricing rules which are “market-derived” and to implement procedures which allow pharmaceutical manufactures to litigate against programs like Medicaid that seek to reduce or contain drug costs. More specifically, the USTR proposal on pharmaceuticals is composed of the following elements:

- Pricing rules – Under the USTR proposal, reimbursement programs like Medicaid would be required to use “competitive market-derived” prices for drug costs. Professor Stumberg suggests that this requirement would tend to work against a government's ability to determine lower drug prices by using its power of pooled purchasing;
- Pricing procedures – The USTR proposal requires governments to fully disclose their methods used to determine drug reimbursement costs and requires that drug companies be allowed to participate in the price determination process. The USTR proposal also provides an appeals procedure for drug companies to challenge reimbursement cost decisions. Professor Stumberg suggests that this approach will result in the inability of reimbursement

programs like Medicaid to successfully negotiate the level of cost containment that they have been able to achieve in recent years and further suggests that drug companies will be able to tie up the cost determination process with extensive and expensive litigation;

- Coverage – The USTR proposal covers “reimbursement programs of national authorities” and unlike previous trade agreements, does not specifically exclude Medicaid. Professor Stumberg points out that the failure to specifically exclude federal reimbursement programs like Medicaid will inevitably result in significantly higher drug reimbursement costs which will be incurred by the states.

Professor Stumberg’s various concerns about each of the elements of the USTR drug reimbursement proposal could serve as the basis for possible action by the CTPC. Alternatively, the CTPC could choose to endorse the USTR proposal.

III. GOVERNMENT PROCUREMENT

Professor Stumberg opened his remarks on this topic by stating that no details have been released regarding what the procurement provisions of the TPPA are likely to look like. Thus, his comments on procurement focused on past and current treatment of state procurement processes in other international trade agreements. [Briefly stated, “Procurement” refers to the process by which governments acquire, purchase or contract for services and products necessary to achieve the policy goals and objectives of the particular government.]

From a U.S. perspective, the topic of government procurement has been treated as a more “pro-democratic” sector of international trade policy. As an example of this more inclusive, democratic approach, in the context of relatively recent WTO negotiations, the USTR has invited states to decide whether to be included in the provisions of particular FTAs. In particular, Maine is one of five states to require that the Legislature must decide whether to be included in the procurement provisions of a particular trade agreement.

Professor Stumberg cited the key elements of WTO’s Agreement on Government Procurement (GPA) as somewhat representative of the restraints put on government procurement by international trade treaty rules:

- Nondiscrimination – a prohibition on the implementation of procurement policies which favor the domestic products, services or suppliers from one nation over that of another;
- Performance based standards – a requirement that whenever appropriate, “technical specifications for procurement shall be described in terms of performance rather than design or descriptive characteristics...”;
- Use of “relevant international standards” – a requirement that whenever possible that technical procurement specifications be based on recognized international standards; and
- Procedural requirements - a general requirement that procedural procurement procedures be clearly spelled out with the use of relevant informational materials.

Professor Stumberg also recounted some recent developments in procurement negotiations:

- In addition to the fact that the contents of any TPPA provisions on procurement have not yet been disclosed, the USTR has stated that it will be delaying any effort on their part to receive

approval from individual states as to whether they wish to be subject to the unstated provisions;

- The U.S. and the European Union are currently discussing the possibility of a U.S.-EU trade agreement in which the EU is advocating for the inclusion of state-level procurement and exemptions from any “Buy American” laws;
- The aforementioned WTO GPA has recently been significantly revised and expanded without the USTR seeking congressional approval. This action also appears to preclude the ability of states to decide whether to opt in or out of the new provisions of the GPA;
- China and a number of other less prominent countries are being considered for inclusion in the GPA which may have the effect of increasing the number of countries that can use the provisions of the GPA to take exception to specific procurement policies; and
- A new series of procurement rules are being considered for adoption under the general Agreement on Trades in Services (GATS). It appears likely that the GATS procurement rules under consideration will be broader in scope than the existing GPA rules though it is not yet known whether their perspective content will be similar to GPA procurement rules.

Professor Stumberg then described an important procurement dispute that involves the Canadian province of Ontario vs. the EU and Japan. In 2009, Ontario developed a “feed-in-tariff” (FIT) program that provides “guaranteed, above-market, long-term pricing” for power generated by wind and solar energy facilities. To qualify for participation in the FIT, Ontario requires that a minimum percentage of the power to be produced with equipment that is manufactured in the province. Implementation of the FIT is achieved through public procurement contracts for the purchase of power produced by these facilities. Professor Stumberg noted that as a province, Ontario is not bound by Canada’s participation in the GPA.

Japan and the EU are using the WTO to litigate their contention that the FIT violates international procurement rules in that:

- The “resale” of energy to consumers is not in fact an example of government procurement; and
- The favoring of local products is not an allowable purpose of procurement.

Professor Stumberg cautioned that if the EU/Japan litigation against Ontario’s FIT is successful, it could likely have the ripple effect of calling into question the previous actions of many states to remove themselves from the procurement provisions of the GPA and many FTAs.

Professor Stumberg concluded his remarks with a series of issues regarding procurement that the CTPC may wish to engage in:

- What are the actual procurement provisions of the TPPA and will states have the option of deciding whether to be subject to these rules?
- Will the USTR submit the revised GPA to Congress for ratification and will individual states be able to opt in or out of its provisions?
- What are the procurement implications of a potential EU- US trade agreement?
- When is China (and other nations) likely to join the GPA and what are the procurement implications for states with the inclusion of more countries?

- What is the current status of GATS negotiations and what are the ramifications of having GATS procurement provisions possibly overriding the current commitments made by nations (and states) under GPA?
- What are the possible consequences for state procurement policies if the EU/Japan litigation against Ontario's FIT prevails? Will that possible outcome serve as precedent for rendering state participation to participate (or not) in previous FTA procurement chapters as meaningless?

The public hearing concluded with testimony from Ms. Nicole Brown representing the Maine Fair Trade Campaign. Ms. Brown related the concern of her organization that the current TPPA negotiations are lacking in transparency and in fact represent an unprecedented degree of secrecy and ultimately a lack of meaningful public participation and review. Ms. Brown also cited her belief that in contrast to lack of meaningful public participation in the TPPA negotiations, that some 600 corporate lobbyists have access to USTR documents that are being used in the TPPA negotiations.

Representative Joyce Maker adjourned the public hearing at approximately 2:30 PM.